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IN THE

Supreme Court of the United States

No. .....
October Term, 1976

No. 76-633

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-against-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of JOSEPH ROMAGNOLI,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of JOSEPH ROMAGNOLI,

Respondent.

Petitioner Aaacon Auto Transport, Inc. herewith replies to the brief filed with this Court by State Farm Mutual Automobile Insurance Company in opposition to petitioner's petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

I
THE SIGNIFICANCE OF THIS CASE TRANSCENDS THE CLAIM IN DISPUTE.

State Farm has acknowledged in its brief in opposition* that the central premise of the Second Circuit's decision holding the arbitration agreement herein invalid, is that 49 U.S.C. Sec. 20(11) prohibits every conceivable restriction on carrier liability, and that implied within this prophylactic concept is a prohibition against "venue liability":

> "[49 U.S.C. 20(11) prohibits] unequivocally, not merely any limitation of liability imposed by the

---

* State Farm's brief in opposition is hereinafter referred to as "SFBO". Aaacon's petition for certiorari heretofore filed herein, is hereinafter referred to as "AP".

> statute, but any limitation of liability of any kind, whether or not the liability sought to be limited is created by the statute or exists apart from the statute." (SFBO 9) (Bracketed material added.)

As heretofore noted this represents not only a complete reversal of past statutory construction of 49 U.S.C. Sec. 20(11) by the Congress and the Courts but, more importantly, it has implications beyond the immediate dispute between the parties. The Second Circuit's construction, which it calls "sweeping" (Appendix 2, p. 24a), affects the liability of all carriers, because it announces an expansion of interstate carrier liability beyond any concept heretofore given credence by any federal court, destroying away traditional carrier defenses.

In any event, it is clear that for the Second Circuit's decision to stand, the language of 49 U.S.C. Sec. 20(11) must be construed to prohibit every restriction on carrier liability, in order to encompass a restriction on "venue liability" on the part of carriers.

II

THE SPLIT BETWEEN THE CIRCUITS IS RELEVANT TO THIS PETITION.

While respondent State Farm asserts that there "is no conflict among the Circuits" (SFBO 3), that statement is refuted in the "Errata" published by the Second Circuit (Appendix 4, AP 39a). Therein the Second Circuit acknowledged that the Third Circuit's decision in *Aaacon v. Jacobson*, 475 F2d 1394 (3rd Cir. 1973) was not "an affirmance from the bench" as it was originally characterized in the Second Circuit opinion. Rather, *Jacobson* was an affirmance by the Third Circuit of a reasoned District Court order upholding the validity of the arbitration agreement. *Jacobson* is citable, and is the law of the Third Circuit. The Third Circuit's decision in *Jacobson* is reproduced at Appendix 5 (AP 40a-41a).

State Farm also avers that *Jacobson* did not deal with the issues considered in the instant case (SFBO 3). To the contrary, the record is clear that the Third Circuit had before it the specific issue of whether the arbitration provision constituted a violation of 49 U.S.C. Sec. 20(11)—the central issue considered herein below. The issues presented, to the Third Circuit in *Jacobson* have been summarized (AP 36). If any questions as to what the Third Circuit considered remains in factual dispute, petitioner is ready to reproduce for this Court's convenience the entire arguments and pleadings submitted to the Third Circuit in the *Jacobson* case.

III

THE SECOND CIRCUIT ERRED IN FINDING 49 U.S.C. SEC.20(11) CONSTITUTED AN "ALL-INCLUSIVE" PROHIBITION ON LIMITATION OF LIABILITY

As heretofore noted, the main basis of the Second Circuit's decision is that the arbitration provision here at issue violated 49 U.S.C. Sec. 20(11) because although that statute does not contain specific language creating venue liability for carriers, the statute should read to contain an "all-inclusive" prohibition on any limitation of liability by carriers—including a prohibition against limitations of "venue liability". The Second Circuit cites no case directly in support of its new reading of 49 U.S.C. Sec. 20(11).

Aaacon has heretofore demonstrated in its Petition that both the language of 20(11) and the drafters' reading thereof indicate that the prohibitions contained in 20(11) deal solely and only with money damages and, therefore, are not "all-inclusive" (AP 7-20).

State Farm has not challenged Aaacon's averment that if 49 U.S.C. Sec. 20(11) constituted a prohibition on damage limits only, and was not "all-inclusive", then no venue liability would be implied therein. This is the essence of the holding in *Krenger v. Pennsylvania R.R. Co.*, 174 F2d 556

(2d Cir. 1949). *Krenger* differentiated between all-inclusive statutes which prohibit "any liability created by this chapter" and statutes which have limited scope—as an example of which it cited a statute prohibiting limitations on the "duty to pay damages".

a. The Krenger Decision Controls

In its brief in opposition State Farm quotes only a part of *Krenger* out of context:

> "As the court stated in *Krenger*, '[s]ignificance should be attached to the inclusive nature of the statutory phrase—any liability. . . .' 174 F2d at 558." (SFBO 20)

But the full quote, with emphasis as published by the Court itself, reads:

> "Significance should be attached to the inclusive nature of the statutory phrase—'*any liability created by this chapter.*' Had a restricted meaning been intended, it would surely have been simple, indeed, to limit the statutory provision to the *duty to pay damages.*" (Emphasis in original)*

Clearly, then, if as in 49 U.S.C. Sec. 20(11) only a duty to pay damages is protected from limitation, no all-inclusive liability or implied venue liability is created. Yet, a duty to pay damages is the exact language and interpretation heretofore given to the Interstate Commerce Act 49 U.S.C. 20(11) by its drafters and by the Supreme Court.

b. The Language of the Act Is Not All Inclusive

State Farm seeks to suggest that an expansive meaning reaching the "all-inclusive" prophylaxsis can be discerned by the fact that in enacting 49 U.S.C. Sec. 20(11) Congress "disjunctively" used phrases prohibiting "any limitation of

* As noted below, wherever Congress has created venue liability and protected it from waiver, it has used the language "any liability *created by this chapter*". Cf. *Wilko v. Swan*, 346 U.S. 427 (1953) and *Krenger*, supra. This language is not found in 49 US Sec. 20(11).

liability *or* limitations of the amount of recovery". However, two factors refute against this suggestion. First, petitioner has heretofore observed that the entire phrase is preceded by the word "notwithstanding" and has been read by its author Senator Cummins as directly modifying a carrier's liability for damages, i.e., the entire phrase reads that a carrier shall be liable as follows:

> "Therefore we provided that the [carrier] should be liable . . . *for the full actual loss*, damage or injury caused by it *notwithstanding any limitation of liability or limitations of the amount of recovery or representations or agreements as to value in any such* receipt or bill of lading. 51 Cong. 9621 (1914) (Emphasis added)

Second, the language which State Farm characterizes as "disjunctive" has been interpreted by the Supreme Court as prohibiting limits on either carrier caused injury *or* the amount of damages. *Boston & Main R.R. v. Piper*, 246 U.S. 439, 446 (1918). It is similar to water carrier liability under the Carriage of Goods by Sea Act (COGSA) 46 U.S.C. Secs. 190 and 1303(8) which Congress similarly prohibited limitations on both liability for a carrier's acts and limitations on the amount of recovery. As noted below arbitration at foreign locations under COGSA is permitted by law.

Clearly, neither Congress nor the courts have had any difficulty in interpreting the language of 20(11) as not creating all-inclusive liability.

While State Farm has alleged, Aaacon misconstrued Knorst's interpretation of the Carmack Amendment, State Farm's quotation (SFBO 14) omits preceding language consistent with Aaacon's averments that the amendment dealt with money damage limitations:

> "First Cummins Amendment of 1915.
> This amended the Carmack amendment (sec 20) and was enacted subsequent to the court's decision in *Adams Express Co. v. Croninger*, 226 U.S. 491. This amendment abolished the system of released

> rates based on agreed valuations. In other words, it nullified provisions limiting liability contained in public tariffs and in bills of lading.

1 *Knorst* on Interstate Commerce Law and Practice 102 (1953).

c. The Supreme Court Has Heretofore Declared That The Meaning of "Liability" in 20(11) Is Not All-Inclusive

The definition of the word "liability" as used in the Interstate Commerce Act had been considered by the Supreme Court in *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913) which held it to be concerned with the question of damages. The Supreme Court therein rejected the "all-inclusive" concept:

> "What is the liability imposed [by the Carmack Amendment] upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. *The suggestion that an absolute liability exists for every loss, damage or injury,* from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress *is not conceivable.* (Bracketed language and emphasis added)

To paraphrase the Supreme Court in *Adams Express:* to suggest, as the Second Circuit has, the intent of that Congress in enacting 49 U.S.C. Sec. 20(11) was to create an all-inclusive prohibition against liability "is not conceivable."

More recently, this Court in reviewing the history of 49 U.S.C. Sec. 20(11) affirmed the view expressed in *Adams Express.* In *Peyton v. Railway Express Agency, Inc.,* 316 U.S. 350 (1942) the Court stated:

> Following the Carmack Amendment, this Court in several cases upheld the power of the receiving carrier to limit its liability to an *agreed valuation,* made to obtain the lower of two or more rates. See *Adams Express Co. v. Croninger,* 226 U.S. 491; *Missouri, K. & T. Ry. Co. v. Harriman,* 227 U.S. 657; *Pierce Co. v. Wells, Fargo & Co.,* 236 U.S. 278. The so-called First Cummins Agreement of March 4, 1915, 38 Stat. 1196, prohibited in general any such limitation of liability. By the Second Cummins Amendment of August 9, 1916, 39 Stat. 441, Congress adopted the *present* provisions authorizing limitation of liability in the manner already noted and substantially *restored the rule of Adams Express Co. v. Croninger, supra.* (Emphasis added)

Id. at 351, 352.

d. Conditions Precedent Are Consistent With 20(11)

If the prohibition against limitations of liability in 49 U.S.C. Sec. 20(11) is all-inclusive as the Second Circuit's decision requires, how can the statements of Senator Cummins that his bill did not make carriers "liable under circumstances which they are not now liable" (51 Cong. Rec. 9626) can be reconciled? How can decisions be explained sustaining carrier defenses such as Act of God, *Farr Co. v. Union Pac. R. Co.,* 106 F2d 437 (19th Cir. 1939); inherent defect in cargo, *Eastern Motor Express v. A. J. Machsmeyer,* 247 F2d 826 (2d Cir. 1957); acts of the shipper, *Hamilton Foods v. Hamilton Foods v. Atchison. T. & S.F.R. Co.,* 83 F. Supp. 478 (DC Cal. 1947), aff'd. 173 F2d 573 (9th Cir.).

More directly in point, how can the right of carriers to place conditions precedent to shipper claims litigation in contracts of interstate shipment be explained? Contract provisions requiring 9-month written notice of claims, and 2-year and 1-day periods of limitation on litigation under 20(11) have been consistently held by courts to *terminate*

carrier liability unless complied with. *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633; *Georgia F. & A. Co. v. Blish Milling Co.*, 241 U.S. 190 (1910); *Baltimore & Ohio R.Co. v. Leach*, 249 U.S. 247 (1919); *B & A Walterman Co. v. Penn. R.R. Co.*, 295 F2d 627 (6th Cir. 1961). The only action Congress has ever taken with regard to these conditions precedent is to set an outside limit on them. That is, Congress legislated that a contractual period for written claims notice may not be shorter than nine months, nor a contractual period for limitation on the commencement of litigation be shorter than two years and 1 day. Surely, if the prohibition on limitations of liability was "all-inclusive" as the Second Circuit has averred, these conditions precedent would have been clearly nullified.

State Farm side steps this issue by calling these statutory restrictions on conditions precedent as "provisos" (SFBO 12). But conditions precedent were neither "provided" nor "authorized" by Congress. That is, they were not limitations of liability which Congress *added on* to the otherwise all-inclusive prohibition in 49 U.S.C. Sec. 20(11). The right of carriers to place conditions precedents in contracts of shipment has at *all times* been in full force and effect, from the enactment of the first Carmack Amendment in 1906 to the present. All Congress did was to require them to be *no shorter than* nine months and two years and one day respectively.

e. The Congressional Debates on The Language of 20(11) Indicates That It Deals With Money Damages And Rejects All-Inclusive Liability

State Farm has failed to refute the Congressional history of the Interstate Commerce Act presented in Aaacon's Petition (AP 9-21). In quotation after quotation the Congressional authors of the amendments to 49 U.S.C. Sec. 20(11) have stated and reiterated their interpretation and intent to prohibit restrictions on damages only, and not to make the statute "an all-inclusive prohibition of restrictions on carrier liability" Senator Cummins stated

that his amendment sought, not to create a prohibition of any liability, but only to restrict prohibitions on money damage:

> "*The very purpose of the bill is to prohibit the agreement with regard to a release of value* to a certain point . . . (U)nder the (current) practice of the railroad company . . . the shipper must accept his indemnity or his damages based upon *this released value, or diminished value. The purpose is to put an end to that practice.*" (Emphasis and bracketed language added.) Cong. Rec. 9621, 9622 (1914).

Instead of dealing with this issue State Farm requotes a small excerpt from the Congressional debate cited in *Atlantic Coast Line v. Riverside Mills*, 219 U.S. 186 (1911) in which Congress was considering adding additional *parties* to be liable. (SFB032) State Farm's quotation is out of context. It does not deal with *where* a carrier may be sued, i.e., venue of litigation, but merely *who* may be sued. The fuller quotation of *Atlantic Coast Line*, only a portion of which State Farm sets forth in its brief, is found in Aaacon's Petition (AP 13). In that statement, Congressman Richardson clearly indicated that the purpose of the Carmack Amendment was to make additional carriers liable to the shipper and relieve the shipper of the burden of proving which of several connecting carriers damages his goods. No mention was made of venue.

f. 20(11) Explicitly Restricts Venue—A Concept Inconsistent With The Second Circuit's Decision

To buttress its view that the Interstate Commerce Act 49 U.S.C. Sec. 20(11) impliedly contained a prohibition against limitation of "venue liability", State Farm asserts that Congress intended to expand venues in which shippers could sue carriers. However, the statute itself indicates the contrary. State Farm ignores completely the language in the statute which specifically contracts venue:

> "All actions brought under or by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, *only* in a district, and if in a state court, *only* in a state through or into which the defendant carrier operates a line of railroad . . . " (Emphasis added)

The restrictive use of the word "only" cannot be reconciled with a concept of expanding venue. Congressional debates thereon so indicate. As heretofore noted (AP 19-21) Congressman Newton in discussing the Newton Amendment to the Interstate Commerce Act indicated that the clear language of 49 U.S.C. Sec. 20(11) which restricts the venues in which carriers may be sued was enacted after Congress accepted:

> ". . . the suggestion of the *carriers* in making this limitation as to the forum where the suit must be brought". 67 Cong. Rec. 12764.

He viewed his bill as protecting carriers so that they would *not* be compelled to defend suits against them at places where they maintained an office but did not have railroad tracks (67 Cong. Rec. 12764).

Cases interpreting 49 U.S.C. Sec. 20(11) have similarly held that the place in which a carrier can be sued is limited by the very language of the Interstate Commerce Act. *W.D. Lawson Co v. Penn Central*, 456 F2d 419, 423 (6th Cir. 1972); *Litvak Meat Co. v. Baker.** 466 F2d 329 (10th Cir. 1971); *Pratt v. Denver R. & G.W.R. Co.*, 284 Fed 1007 (DC Minn. 1922); *Phillips Atusen Corp. v. Denver R. & G.W.R. Co.*, 321 NYS. 2d 515, 76 Misc. 2d 808 (1973).

State Farm has asserted that Congress intended to protect shippers:

* State Farm doesn't defend Second Circuit's interpretation of *Litvak* as recognizing separate negligence liability of carriers outside 20(11). The restriction of venue in 49 U.S.C. Sec. 20(11) is recognized in State courts as well. *Phillips Atusen Corp. v. Denver & GWR Co.*, 321 NYS. 2d 515, 76 Misc. 2d 808 (NY 1973). See fuller discussion in footnote at AP 21.

> "Affording extensive venue to the class sought to be protected—shippers—was no secret." (SFBO 24, 25).

This is error. It apparently was a "secret" from Congressman Huddleston. As heretofore noted (AP 19) Congressman Huddleston declared that the Newton Amendment limited litigation against carriers to only certain courts:

> ". . . suited to the convenience of the carrier. 67 Cong. Rec. 1263.

In response to this, Congressman Newton asserted that it was the intention of Congress to balance the right given to shippers to sue more than one carrier (the initial carrier or the delivering carrier, without proving which of the two was at fault) with a *restriction* on the venue of litigation.

Congressman Newton, declared that the language was enacted:

> ". . . so that the *carrier* could not be forced to stand suit at some distant point far away from where its witnesses would be available." 67 Cong. Rec. 12759 (1926) (Emphasis added)

Further, Congressman Newton acknowledged that the restrictive venue was a:

> ". . . limitation as to the forum where the suit must be brought." 67 Cong. Rec. 12764 (1926)

State Farm ignores these statements and asserts that a Congressional intent to expand venue in 49 U.S.C. Sec. 20(11) can be seen in the fact that the Interstate Commerce Act expanded venues in which a carrier could be sued when compared to the pre-Newton Amendment situation. This is error. The federal venue prior to the Newton Amendment was broad. The Newton Amendment clearly restricted it.

The cases and statutes cited by State Farm do not support its thesis. Thus, State Farm errs in stating that the Newton Amendment:

". . . was the creation of a liability to suit in a federal venue not previously permitted. (SFBO 36)

State Farm cites the case *Macon Grocery Co. v. Atlantic Coast Line R.R. Co.*, 215 U.S. 501 (1910) for the proposition that prior to the Newton Amendments a railroad was not subject to litigation under "general federal venue" except in the single state in which it was an inhabitant. What State Farm has apparently overlooked is that the 1888 statute upon which *Macon Grocery* relied and quoted, contained a specific "inhabitant" limitation of venue, 215 U.S. 501 506. This provision was eliminated over fifteen years prior to the Newton Amendment when the predecessor to 28 U.S.C. Sec. 1337 (now 28 U.S.C. Sec. 41(a)) was enacted. The 1913 Judiciary Act provisions eliminated the "district of residence" language.

State Farm cites to *W.D. Lawson & Co. v. Penn Central*, 456 F.2d 419, 424 (6th Cir. 1972) to support its thesis that under the Carmack Amendment a wide range of venue was envisaged by Congress for Section 20(11) claims. A review of the *Lawson* case indicates the contrary. The Sixth Circuit Court of Appeals there strictly enforced the venue limitations against suits brought by shippers against carriers and permitted the litigation to continue only in those districts where "the Carmack Amendment *allowed* the suit to be brought against the remaining [carrier], Fort Worth and Denver . . . " Interestingly, the Sixth Circuit in *Lawson* noted, as did the district court below in the instant case, that the witnesses had to travel a good distance (from Ohio to Tennessee) and that the alternate forum sought (Texas) would afford no greater relief. So too, in the case at bar. As has been heretofore noted, the forum of California is inconvenient and a great distance from the residence of *every* witness except Mr. Romagnoli (who has no personal knowledge of any aspect of this case.) (AP. 4).

State Farm acknowledges (SFBO 35) that the Newton Amendment language, concerning the venue in which carrier could be sued, is a "compromise" arrived at by Congress. This being so, it is inconceivable that the venue

language is to be swept aside by the Second Circuit's construction of the language to create "all-inclusive" carrier liability and thereby impliedly finding venue liability.

IV
THE SECOND CIRCUIT'S FELA ANALOGY IS UNTENABLE

In 9 U.S.C. Sec. 1 and 2 Congress provided that all contracts for arbitration were enforceable except those explicitly excluded. In no Federal decision has that declaration of Congress been altered. Only where Congress has expressly indicated an interest to protect the claim from arbitration in another statute, has 9 U.S.C. Sec. 1 and 2 been deemed modified. This has been done only in two statutes, the FELA 45 U.S.C. Sec. 55 and 56 and the Securities Act 15 U.S.C. Sec. 77n. Cf. *Wilko v. Swan*, 346 U.S. 427, 430 (1953). In both statutes Congress enacted specific language prohibiting waiver of any provision "created by" those statutes. No such language is found in the Interstate Commerce Act.

The Second Circuit used the analogy to the FELA cases because of the absence of any Federal decisions holding that 49 U.S.C. Sec. 20(11) created an all-inclusive liability. In fact, the *Krenger* case, an FELA decision, cited by the Second Circuit indicates that the "venue liability" found under the clearly broad language of FELA 45 U.S.C. Sec. 55 and 56 rests upon the clear Congressional intent in FELA to expand venue:

> "The *importance* of this *extensive choice of venue* to injured railroad workers is no secret; it was fully set forth by Senator Borah in sponsoring the Amendment of 1910 which *granted the choice*—a bit of legislative history recently recounted at length in decisions reenforcing the option *against suggested judicial limitations.*" (Emphasis added) (AP24)

As heretofore discussed, the intent of Congress in enacting the Newton Amendment 49 U.S. Code 20(11) was to restrict venue.

The FELA analogy also fails because FELA specifically gave claimants rights they heretofore lacked. State Farm errs in stating:

> "[L]ike the FELA the Commerce Act creates new substantive rights and liabilities." (SFBO 27).

Senator Cummins stated the intent of Congress to keep common law rights and liabilities of carriers intact:

> "Under the common law . . . there can be a limitation upon the amount of recovery upon a statement of value. I want to get rid of that part of the common law, but *not* the part of the common law that . . . the common carrier shall *not* be liable in the event of injuries caused by the act of providence or the public enemy." 51 Cong. Rec. 9625, 9626 (Emphasis added)

Case after case has affirmed that the Interstate Commerce Act by the clear language thereof leaves carrier's rights and liabilities at common law intact. *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964); *J. & H. Flyer, Inc. v. Penn. R.Co.*, 316 F2d 203, 205 (2d Cir. 1963); *L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F2d 488 (10th Cir. 1964).

Finally, the FELA analogy fails because, unlike the FELA, 49 U.S.C. Sec. 20(11) is not "remedial". The cases cited by State Farm to support this concept deal solely with the requirement that interstate carriers be certificated by the Commission. (SFBO 20-21) The remedies of the Commission to effect proper licensing of interstate carriers has indeed been characterized as "highly remedial". In contrast, the Interstate Commerce Act provision here at issue, 49 U.S.C. Sec. 20(11), has been found *not* to create a statutory standard which affords any separate remedies. *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964); *J. & H. Flyer, Inc. v. Pennsylvania R.R. Co.*, 316

F2d 203, 205 (2d Cir. 1963). For example, the failure of a carrier to properly pay a claim is not prohibited by, and does not even constitute a violation of, the Interstate Commerce Act. *Atlantic Coastline R.R. Co. v. Riverside Mills*, 219 U.S. 188, 208 (1911).

Not only does the FELa analogy fail, but the following consideration of cases with statutes practically in *haec verba* with the Interstate Commerce Act support the validity of arbitration at given locations.

V
ANALOGIES TO COGSA & MILLER ACT CASES SUSTAINS THE VALIDITY OF THE ARBITRATION AGREEMENT HEREIN

In the Carriage of Goods by Sea Act (COGSA) 46 USC 190 and 1303(8) Congress granted to shippers by water the same rights that it had granted to shippers by motor and railroad in the Interstate Commerce Act. COGSA thus:

> 1. prohibits contracts "relieving carriers from liability for loss or damage from negligence, fault or failure in proper delivery;" and
>
> 2. declares "any . . . agreement in a contract of carriage . . . relieving the carrier . . . from liability for loss or damage to . . . goods or failure in the duties and obligations provided in this section or lessening such liability" . . . "shall be null and void and of no effect".

Yet, claims brought under the COGSA involving arbitration at distant locations have been upheld by Federal Courts as valid and enforceable.

So close in language and intent are the provisions of COGSA and 49 USC Sec 20(11) that it is impossible to reconcile how a shipper and carrier by water may agree to arbitrate at a particular forum with the Second Circuit's position that a shipper and carrier by motor may not so arbitrate. In this regard State Farm appears to acknowledge the irreconcilability of COGSA cases per-

mitting distant arbitration and the Second Circuit's decision saying:

> "It is hard to believe that the Court would permit, through a limited venue provision in an arbitration clause, a limitation of the liability for damages directly prohibited by COGSA, while refusing to permit it otherwise." (SFOB 46)

Yet it is clear that in cases arising under COGSA, arbitration at distant forums is permitted and enforced. *Kurt Orban Inc. v. S/S Clymena.* 3108 F. Supp. 1390 (SDNY 1970); *Lowry & Co. v. S/S LeMoyne D'Iberville.* 253 F. Supp. 396 (SDNY 1966), app. dism. 372 F2d 123 (2d Cir. 1967) and cases heretofore cited. (AP 29-30).

The Congress of the United States has made no exception in the Federal Arbitration Act to exclude arbitration between corporations and individuals. In fact, the Interstate Commerce Commission, considering the applicability of arbitration, has deemed that it should be applied consistently to all shippers regardless of size:

> ". . . We are persuaded that the advantages of arbitration will be lost unless the remedy is available to shippers and carriers on a *non-selective, across-the-board basis in advance of the discovery of a dispute*". (Emphasis supplied) *Ex Parte 263.* 340 ICC 587, 588 (1972).

State Farm's suggestion that Congress intended to differentiate arbitration by the size of the claimant is not justified by any language contained in the Act nor can State Farm cite any authority therefor.

Agreements to arbitrate at given locations under cases arising under the Miller Act also presents a clear analogy to the instant case. The Miller Act, 40 U.S.C.270(b), protects small subcontractors and creates a cause of action against large building companies working on government contracts. (AP 25). The Miller Act also contains venue language similar to the Newton Amendment of 49 U.S.C. Sec. 20(11). *United States v. Eric Elevator Corp.*, 214 F.

Supp. 947 (DC Mass. 1963). Federal Courts have held that the statutory rights of the Miller Act subcontractors are not violated by the agreements for arbitration of Miller Act claims at New York. See cases heretofore cited (AP 20-27).

On the contrary, the Federal Arbitration Act speaks in the broadest possible terms to validate *all* contracts between *all* parties providing for arbitration. 9 U.S.C. Sec. 2. And, as heretofore noted, in the absence of explicit statutory grounds for excluding arbitration explicitly found in the Federal Arbitration Act 9 U.S.C. Sec. 1 or in other statutory schemes protecting specific venue rights—such as FELA and the Securities Act—a contract for arbitration is enforceable. Cf. *National Equipment Rental v. Szukhent.* 376 U.S. 311 (1964).

VI
CONGRESS HAS PREEMPTED THE VENUE QUESTION IN ITS ENACTMENT OF THE FEDERAL ARBITRATION ACT

Aaacon had argued to tne Second Circuit that the Federal Arbitration Act 9 U.S. Code Sec. 4 was a "venue mandating" statute, i.e., that the place of arbitration is not governed by agreements between the parties, rather in 9 U.S.C. Sec. 4 congress mandates that the venue of hearings on the validity of arbitration be the place in which the petition for arbitration is filed. Thus the venue provisions in the agreement herein cannot be the basis for invalidity—since they do not control.

The Second Circuit did not deal with this issue other than to characterize the question as an invitation by Aaacon for the Second Circuit to "rewrite the contract". State Farm, in its brief in opposition, does not defend the approach of the Second Circuit. Rather, State Farm acknowledges the question (SFBO 49) but attempts to dispute it with the discredited proposition that the venue of arbitration under 49 U.S.C. Sec. 4 is governed not by the specific venue mandate contained therein, but rather, by

the general "forum non conveniens" provisions of the Judiciary Act, 28 U.S. Code 1404(a) (SFBO 52). State Farm is in error.

As heretofore noted, (AP 31-35) Federal Courts of Appeals and District Courts throughout the United States have consistently interpreted 9 U.S.C. Sec. 4 as mandating that the venue or arbitration is to be solely the district in which a petition for arbitration is filed, regardless of the written agreements by the parties concerning venue, which may be to the contrary; and despite the general discretionary provisions concerning transfer of venue under 28 U.S.C. Sec. 1404(a). See for example *Aaacon Auto Transport, Inc. v. Ninfo*, 490 F2d 83 (2d Cir. 1974) and cases heretofore cited (AP 31-35).

The power of the Congress to control the venue of litigation and arbitration is beyond dispute. *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404, 406 (1967).

State Farm cites only one case for its proposition that the venue mandating language of the Federal Arbitration Act permits a shifting of venue under the doctrine of forum non conveniens or under 28 U.S.C. Sec. 1404(a): *Swift Industries, Inc. v. Botany Industries*, 297 F. Supp. 1056 (WD Pa. 1969). State Farm's reliance on *Swift Industries* is misplaced for two reasons.

First, the case does not stand for the proposition cited. In *Swift Industries*, the court never transferred the case. Nor was a motion made for a change of venue under 28 U.S.C. Sec. 1404(a). The issue in *Swift Industries* was whether or not service of process had been properly effected. The Court found proper service. It then held that venue was proper in *the district where the petition was filed*. Id. at 1058. The Court also refused to stay the arbitration pending the outcome of litigation in a federal district court in another circuit.

Second, *Swift Industries* was not a "federal question" case but it was based solely on diversity jurisdiction. Cases for shipper claims are in the original, albeit non-exclusive, jurisdiction of federal courts.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) cited by State Farm is not a case dealing with arbitration. Nor has State Farm cited *any* case dealing with arbitration where the forum of the hearing of the validity of the agreement to arbitrate, or the forum of the place of arbitration has been other than the district in which the petition was filed (herein New York).

Under the facts of this case, and in light of the corporate nature of both parties with counsel and offices in New York, there is no question that (a) both petitioner and respondent below were amenable to service of process in New York and (b) that service of process was effected upon the parties and a petition filed in the New York Federal Courts. Accordingly, under the clear Congressional mandate of the Federal Arbitration Act 9 U.S.C. Sec. 4, the place of arbitration could only be New York, regardless of the existence or non-existence of any provision in the agreement between the parties concerning the venue of arbitration.

Parenthetically, State Farm asserts that the "shipper herein resides in California" (SBO 50). Yet the District Court below noted, not only is the shipper not a party to the litigation, (and has *no* personal knowledge of the facts of this case) but witnesses vitally concerned with questions of proof of the plaintiff's and the defendant's case are spread throughout the United States from Georgia, Wyoming, New York, California, Washington and South Carolina (AP 4).

The reason Congress made arbitration enforceable under 9 U.S.C. Sec. 2 and set aside obstacles thereto is that it is fast and speedy. As the District Court below noted, where, as in the instant case, witnesses are spread all over the country, California is not superior to New York. In fact, the expert witness from Washington State has to travel approximately 1,500 miles to testify in Los Angeles. Surely, no great advantage is lost if he were required to travel to New York. Moreover, in arbitration his deposition would be clearly admissible without personal appearance.

VII
THE ESTOPPEL ARGUMENT IS ENTIRELY WITHOUT SUPPORT AT LAW OR IN FACT

Aaacon has heretofore asserted that the letter of Commission employee McCarthy rejecting a tariff filed by Aaacon in 1971 did not create an estoppel of Aaacon's right to subsequently include a provision for arbitration in its bill of lading. Aaacon pointed out (AP 37 to 44) that:

1. The McCarthy letter was not "an act of the Commission." It was not appealable to the Courts as a final act would be. The Second Circuit has conceded that a review of McCarthy's letter by the Commission would require general petition *de novo*. Clearly, had the letter been a final act of the Commission, a general petition *de novo* would be unnecessary. This difference is not "semantic" as State Farm submits (SFBO 55, 56).

2. In the absence of jurisdiction over carrier claims (which was not asserted by the Commission until September, 1972 in *Ex Parte 263*, 340 ICC 515) the filing rejecting by McCarthy was "gratuitous" and the rejection was not binding. State Farm has sought to refute this citing *Greyhound Lines, Inc. v. U.S.* 1967 CCH Federal Carrier Cases, page 53, 607, paragraph 81, 928, asserting that *Greyhound* stands for the proposition that the Commission has the right to regulate tariffs even where it has no jurisdiction over the subject matter. The *Greyhound* case does not stand for the proposition cited. In *Greyhound*, unlike the instant case, it was not an act of Commission personnel which rejected a tariff, but rather it was the *carrier* which sought to *change an existing tariff* by asserting that the tariff was not subject to Commission jurisdiction. The Court therein noted that Congress had provided that any change in an *existing* tariff, regardless of grounds, required an administrative hearing under 49 U.S.C. Secs. 316 and 317. By contrast, it has been held that the filing of a tariff with the Interstate Commerce Commission does not create jurisdiction in the Commission to regulate the practice filed thereunder, if the practice is

outside the Commission's authority. *Greater Baton Rouge Port Commission v. American Barge Line Co.*, 299 I.C. C. 736.

3. Internal Minute No. 74 cited by the Second Circuit to lend authority to the McCarthy letter was not published, nor was it binding upon carriers. State Farm has noted (SFBO 5) that in its reargument petitioner herein submitted informal correspondence to the Second Circuit. Included therein was a letter dated June 23, 1976 from the Secretary of the Interstate Commerce Commission, Robert Oswald, covering Internal Minute No. 74:

> "This is in response to your letter of June 14, 1976, regarding Internal Minute 74, *Rejection of Tariffs, etc.*
>
> The internal minutes of the Interstate Commerce Commission are for the internal use and not for public dissemination. I am sure that you will conclude from even a casual reading of Internal Minute 74 that it is intended for internal application, *i.e.*, to designate certain personnel of the Commission who may perform delegatable statutory and administrative functions.
>
> Internal Minute 74 does not contain even the slightest hint that it is intended to confer any right or impose any duty whatsoever upon carriers subject to the Interstate Commerce Act. Hence, since 5 U.S.C. 552(a)(2)(c) applies only, *inter alia*, to a "staff manual or instruction that affects a member of the public," it has no applicability whatsoever to Internal Minute 74.
>
> It would seem to follow that since Internal Minute 74 has not been published it would not be binding upon a carrier even if it purported to be, which it does not. I cannot comprehend any convoluted reasoning upon which the contrary would be urged, *i.e.*, that it was intended to be somehow binding but was not so binding because of lack of publication."

Aaacon does not assert that the Oswald letter constitutes an act of the Commission. It does however question the effect of Internal Minute No. 74, relied on by the Second Circuit.

4. State Farm does not deal with the fact that the rationale set forth in the McCarthy letter was based upon erroneous interpretations, and was superseded by subsequent court decisions, as more fully discussed in Aaacon's petition (AP 42).

5. The right of Aaacon to include in its agreement a provision for arbitration at a given location was approved by the Commission the first time the Commission asserted jurisdiction in September, 1972 (AP 43-44).

It is thus clear that the McCarthy letter does not estopp Aaacon from defending the lawfulness of the arbitration provision here at issue.

VIII
CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to review the decision of the Second Circuit.

Respectfully submitted,

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